ASSUMPTION OF EXISTING PARTNERSHIP INDEBTEDNESS BY INCOMING PARTNER.—A person admitted into an existing partnership is not liable for debts previously incurred by the firm.[1] He may become liable for such debts, however, by an agreement, either expressed or implied in fact, between himself and the other partners, provided that the creditors of the partnership assent to this change of responsibility.[2] And in those jurisdictions where a beneficiary of a contract is given a right to sue upon it, the creditors may sue without a novation.[3] In spite of all the formal requirements for a contractual obligation that are said to be necessary, the courts are willing to imply a promise by the incoming partner, upon slight evidence, from the circumstances surrounding the new partner's entry into the firm and his continuance therein,[4] especially where the new partnership takes over the assets of the old firm and continues business without any noticeable change.[5] In like

[1]Young *v.* Hunter (1812) 4 Taunt. 582; Vere *v.* Ashby (1829) 10 B. & C. 288; Atwood *v.* Lockhart (U. S. C. C. 1848) 4 McLean 350; Freeman *v.* Huttig Sash & Door Co. (1913) 105 Tex. 560, 153 S. W. 122; see Serviss *v.* McDonnell (1887) 107 N. Y. 260, 14 N. E. 314; Lindley, Partnership (7th ed.) 323; 1 Rowley, Modern Law of Partnership § 561; Story, Partnership (2nd ed.) § 152.

[2]Frazer *v.* Howe (1883) 106 Ill. 563; Lucas *v.* Coulter (1885) 104 Ind. 81, 3 N. E. 622; Ringo *v.* Wing (1887) 49 Ark. 457, 5 S. W. 787; Flour City Nat'l. Bank *v.* Widener (1900) 163 N. Y. 276, 57, N. E. 471; see Kountz *v.* Holthouse (1877) 85 Pa. 235, 237; Ayres *v.* Gallup (1880) 44 Mich. 13, 5 N. W. 1072; Rohlfing *v.* Carper (1894) 53 Kan. 251, 36 Pac. 336; Karraker *v.* Eddleman (1901) 101 Ill. App. 23; *In re* Family Endowment Society (1870) L. R. 5 Ch. App. 118; Lindley, *op. cit.* 322, for rule in England; 1 Bates, Partnership § 510; Story, *op. cit.* § 152; 1 Rowley, *op. cit.* § 562.

[3]Poole *v.* Hintrager (1882) 60 Iowa 180, 14 N. W. 223; Ringo *v.* Wing, *supra*; Hannigan *v.* Allen (1891) 127 N. Y. 639, 27 N. E. 402; *cf.* Warren *v.* Farmer (1884) 100 Ind. 593; Parsons, Partnership (4th ed.) § 337, n. l.

[4]Frazer *v.* Howe, *supra;* McCracken *v.* Milhaus (1880) 7 Ill. App. 169; see *Ex parte* Jackson (1790) 1 Ves. Jr. 131, " * * * for if one man having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable." Cited with approval in Cross *v.* National Bank (1876) 17 Kan. 336, 339. See *Ex parte* Peele (1802) 6 Ves. Jr. 602, 604, Lord Chancellor Eldon declared "Slight circumstances might be sufficient where, in the original transaction, the party to be bound was not a partner, but at a subsequent time had acquired all the benefit as if he had been a partner in the original transaction, and it would not be unwholesome for a jury to infer largely that that obligation clearly, and according to conscience had been given upon an implied authority." See Updike *v.* Doyle (1863) 7 R. I. 446, 463; Peyser *v.* Myers (1892) 135 N. Y. 599, 602, 32 N. E. 699. Parsons, *op. cit.* § 338. "Whether the new incoming partner has thus assumed the old debts is sometimes a difficult question of mixed law and fact * * * Paying of interest on a debt, with a knowledge, without objection, that the new firm pays the interest would warrant a jury in finding such an assumption of the old debt. And perhaps any single fact of like kind would have the same effect. All of these things are evidence for a jury or matter for a court to infer such adoption."

[5]See Shaw *v.* McGregory (1870) 105 Mass. 96; *cf.* Frazer *v.* Howe, *supra*; 1 Smith, Mercantile Law (10th ed.) 44. An incoming partner "is not liable for contracts previously made. If, indeed, after his accession to the partnership he receives benefits from them and recognizes their existence he may become responsible by virtue of a new contract to the same effect as the old one, which his conduct will be evidence of his having entered into along with his partners."

manner, slight evidence is held sufficient to warrant an inference of the assent by the creditors said to be necessary to impose a liability upon the new partner.[6]

A recent example of the slight evidence upon which a promise to assume liability is implied is to be found in the case of *Wood et al* v. *Macafee et al* (N. Y. Sup. Ct. 1918) 172 N. Y. Supp. 703. The defendant, an incoming partner, received an interest in a state road contract under which the firm was operating and was to continue to operate after his entry. He knew that there were liabilities which would have to be met in order to continue business, among which was the debt owed by the old firm to the plaintiff for piping used in the construction of the road. The money contributed by the defendant was used to satisfy some of these liabilities, but the debt owing to the plaintiff was never paid. From these facts the court held that the defendant assumed the antecedent liabilities and that the plaintiff, as creditor of the old firm, could recover as beneficiary of the agreement.

The reason for the willingness of the courts to imply such an agreement upon slight evidence is probably that the creditors of the old firm are otherwise placed in an inequitable situation by the advent of a new partner. His entrance effects a dissolution of the old firm and a new partnership is formed.[7] The property of the old firm becomes that of the new,[8] and, although there is, as a practical matter, often no actual and open change in the conduct of the business,[9] those who become creditors of the new firm after the admission of the new partner or after other changes in membership have a prior claim on the assets of the new firm.[10] This result is particularly inequitable as respects creditors of the old firm in case of bankruptcy of the new,[11] as they are in no position to protect themselves, except where the transfer of the assets has actually been fraudulent.[12] On the other hand, the

[6]Register *v.* Dodge (1881) 6 Fed. 6; Lucas *v.* Coulter, *supra*; see *ex parte* Williams (1817) 1 Buck. 13, 16 "A very little will do to make out and assent to the agreement." See *In re* Family Endowment Society, *supra.* "Very slight evidence indeed would be required to establish that the creditor had taken the liability of the new firm instead of the old."

[7]McCall *v.* Moss (1885) 112 Ill. 493; Allen *v.* Logan (1888) 96 Mo. 591, 10 S. W. 149; see Hatchtett *v.* Blanton (1882) 72 Ala. 423, 435; 1 Rowley, *op. cit.* § 591; Gilmore, Partnership § 185.

[8]New York Commercial Co. *v.* Francis (1900) 101 Fed. 16; see Rand, Receiver *v.* Wright (1894) 141 Ind. 226, 234, 39 N. E. 447; 1 Rowley, *op. cit.* § 540.

[9]Mechem, Elements of Partnership § 219. "The admission of a new partner really constitutes in law a dissolution of the old and a creation of a new partnership; though in actual practice it is often not so regarded, the firm by consent being treated as continuing, notwithstanding the change in membership." Parsons, *op. cit.* § 312. "We have in this country many ancient firms in which there may not be one person who was a partner from the beginning."

[10]Smith *v.* Howard (N. Y. 1859) 20 How. Pr. 121; *cf.* Mayer *v.* Clark (1886) 40 Ala. 259; Brown *v.* Miller (1888) 11 Colo. 431, 18 Pac. 617; Stanton *v.* Westover (1886) 101 N. Y. 265, 4 N. E. 529; 1 Rowley, *op. cit.* § 540.

[11]*Ex parte* Ruffin (1801) 6 Ves. Jr. 119; *ex parte* Williams (1805) 11 Ves. Jr. 3; Smith *v.* Howard, *supra; In re* Suprenant (1914) 217 Fed. 470.

[12]Smith *v.* Heineman (1897) 118 Ala. 195, 24 So. 364; Henderson *v.* Farley Nat'l. Bank (1899) 123 Ala. 547, 26 So. 226; *cf.* Huggins *v.* Rix (1895) 60 Ark. 18, 28 S. W. 422; 1 Rowley, *op. cit.* § 531; Burdick, Partnership (2nd ed. 294).

incoming partner takes the benefits of an organized business and is able to protect himself by having a liquidation of the debts of the old firm. At first glance, therefore, it seems equitable to hold the incoming partner liable on an implied promise to pay the antecedent debts wherever such implication is possible.[13] Certainly, considerations of convenience and business policy justify charging the incoming partner to the extent of his interest in the assets of the partnership. But the courts have overshot their mark. Since the incoming partner is held in contract,[14] the duty to pay which is established, if not performed, may be made the basis of an action in which the judgment obtained may be satisfied not only out of the partnership assets but also out of the personal assets of the new partner.[15]

The Uniform Partnership Act eliminates this difficulty in Section 17 by limiting the liability of the incoming partner to satisfaction out of the partnership property.[16] This is the preferable result. In Section 41 creditors of the old firm are made creditors of the new upon the advent of a new partner.[17] Thus the assignment of an interest in the partnership assets to the new partner does not affect the creditors of the old firm inequitably even where there is no promise to assume the liability on the part of the incoming partner.[18] Consequently it is to be expected in a jurisdiction where the Act is adopted that the courts will cease to imply a promise on the part of the incoming partner under circumstances where such implication is exceedingly difficult to justify, as they would no longer be under an obligation to save the creditors from being placed in an unjust situation.

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[13]Smead etc. *v.* W. B. Lacey etc. (Ohio 1856) 1 Disney 239; Thayer *v.* Humphrey (1895) 91 Wis. 276, 64 N. W. 1007.

[14]See cases footnotes 2 and 3.

[15]See Hallowell *v.* Blackstone Nat'l. Bank (1891) 154 Mass. 359, 363, 28 N. E. 289; Mechem, *op. cit.* § 214; Rowley, *op. cit.* § 497. "The individual property of each partner is as much liable for firm debts as is the firm property."

[16]Uniform Partnership Act (8th final draft). "Sec. 17 (Liability of Incoming Partner.) A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred except that this liability shall be satisfied only out of partnership property."

[17]Uniform Partnership Act (8th final draft) "Sec. 41, (Liability of Persons Continuing the Business in Certain Cases). (1) When any new partner is admitted into an existing partnership . . . if the business is continued without liquidation of the partnership affairs creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business."

[18]The Uniform Partnership Act—With Explanatory Notes, p. 69, note to Sec. 41 (1).